

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI
BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 1185/Mum/2020 (A.Y. 2016-17)

Pranay Godha,
1701/1702, 17th Floor,
Oberoi Sky Heights,
Mumbai-400053.

PAN: AEMPG2714F

..... Appellant

Vs.

ACIT, Central Circle-5(2),
Air India Building, Nariman Point,
Mumbai-400020.

..... Respondent

ITA No. 1186/Mum/2020 (A.Y. 2016-17)

Prashant Godha,
1701/1702, 17th Floor,
Oberoi Sky Heights,
Mumbai-400053.

PAN: AFFPG4317N

..... Appellant

Vs.

ACIT, Central Circle-5(2),
Air India Building, Nariman Point,
Mumbai-400020.

..... Respondent

ITA No. 1187/Mum/2020 (A.Y. 2016-17)

M/s Kaygee Investments Pvt. Ltd.
203 A, Vastu Prestige, New Link Road,
Near Infinity Mall, Andheri (West),

Mumbai-400053.

PAN: AAACK2876M

..... Appellant

Vs.

ACIT, Central Circle-5(2),

19th Floor, Air India Building,

Nariman Point, Mumbai-400020.

..... Respondent

ITA No. 1309/Mum/2020 (A.Y. 2016-17)

DCIT, Central Circle-5(2), Central Range-5,

Room No. 1908, Air India Building,

Nariman Point, Mumbai-400021.

..... Appellant

Vs.

M/s Kaygee Investments Pvt. Ltd.

203 A, Vastu Prestige, Above Tanishq,

New Link Road, Near Infinity Mall,

Andheri (West), Mumbai-400053.

PAN: AAACK2876M

..... Respondent

ITA No. 1310/Mum/2020 (A.Y. 2016-17)

DCIT, Central Circle-5(2), Central Range-5,

Room No. 1908, Air India Building,

Nariman Point, Mumbai-400021.

..... Appellant

Vs.

Pranay Premchand Godha,

1701/1702, Oberoi Sky Heights,

Lokhandwala, Andheri, Mumbai-400053.

PAN: AAACK2876M

..... Respondent

Appellant/Assessee by : Sh. Mani Jain/Prateek Jain
Respondent/Revenue by : Sh. Vinay Sinha, CIT-DR,
Sh. Prasoon Kabra, Sr. DR
Date of hearing : 18/05/2022
Date of pronouncement : 10/08/2022

ORDER

PER GAGAN GOYAL, A.M:

These five appeals (three appeals by assessee and two appeals by Revenue) are directed against the order of Ld. Commissioner of Income Tax (Appeals) -53, Mumbai [hereinafter referred to as ('Ld. CIT(A)') vide common order dated 16.12.2019 for the Assessment Year (AY) 2016-17. In ITA No. 1185 to 1187/Mum/2020, the assessee has raised the similar grounds of appeal except variation of amounts in figures. We are taking ITA No 1185/MUM/2020 as lead case, as the grounds of appeal in ITA No's 1185,1186 and 1187 are similar so the ratio of decisions in ITA No 1185 will be applicable mutatis mutandis to rest of other two appeals of assessee. In ITA No. 1185/Mum/2020, the assessee has raised the following grounds of appeal:

"The following grounds of appeal are without prejudice to one another.

1. On the facts and circumstances of the case and in law the Learned Assessing Officer erred in holding that the provisions of section 28(va) are applicable to the facts of the appellant's case, as per the grounds contained in the assessment order or otherwise.

2. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming the view taken by the Id. Assessing Officer that the sale consideration received by the appellant on sale of shares of M/s. Kaygee Loparex India Pvt Ltd includes a business component being non-compete fee in spite of the fact that the agreement does not specifically mentions about payment of non-compete fees to the appellant.

- 3. On the facts and circumstances of the case and in law the Learned CIT(A) erred in holding that the sale consideration received by the appellant on account of sale of shares of M/s. Kaygee Loparex India Pvt Ltd includes non-compete fee to the extent of 5% of total sale consideration amounting to Rs. 59/- per shares in the appellant's case.*
- 4. The Appellant craves to add, amend, alter, modify and or withdraw any of the above grounds of appeal on or before the date of hearing. "*
2. Brief facts of the case are that the assessee/appellant filed his e-return on 05-08-2016, declaring total income at Rs 2,41,24,870/-. The case was selected for complete scrutiny under CASS.
3. During the year under consideration assessee sold 3,13,270 shares of M/s. Kaygee Loparex India Pvt Ltd (KLIPL) and received a consideration of Rs 30,62,54,837/-(3,13,270x Rs.1183.704). Assessee declared the same under the head long term capital gain.
4. Value per share as certified by valuer as per rule 11UA of the IT Rules, 1962. Comes to Rs 609.823/-, whereas assessee received consideration of Rs 1183.704/- per share. This difference of Rs 5,73,881/- per share, considered as income under the head business and profession by applying sec 28(va) of the IT. Act 1961 by the A.O. being aggrieved with the assessment order passed, assessee preferred an appeal before the Ld. CIT(A)-53, Mumbai.
5. Ld. CIT(A) partly allowed the claim of the assessee and treated Rs. 59/- under the head Income from business and profession as compare to Rs 5,73,881/- as considered by A.O. assessee still being aggrieved preferred this appeal before us.
6. We have gone through and considered the order of the A.O., Ld. CIT(A) and submissions of the assessee along with factual and legal paper book filed by the

assessee. Assessee was a shareholder in M/s KLIPL and holding shares to the tune of 3,13,270. This company KLIPL was part of Loparex BV (Netherlands based company). As a matter of gaining full control over its business partner based at India namely KLIPL, Loparex group based at Netherland offered Rs 1183.704/- per share to the shareholders of KLIPL.

7. To understand the nature of transactions entered into by the assessee with Loparex group we need to examine the covenants of shares sale agreement amongst the assessee and Loparex BV. Relevant extracts of the agreement are reproduced herein below as under:

"C. The VENDORS have agreed to sell and transfer the KAYGEE SHARES and LOPAREX had agreed to purchase and accept the transfer of the said KAYGEE SHARES at the price and on the terms and conditions hereinafter stated:

3.2 The VENDORS further represent, warrant and covenant as follows: -

(a) Each of the Vendors Is the absolute owner of and has clear and marketable right, title and interest in, the KAYGEE shares shows against his/ her/ their/ its name in Annexure -B and the KAYGEE SHARES comprise 50% of the total subscribed and issued equity capital of the company.

(C) On completion of the transaction contemplated under this Agreement, LOPAREX shall own 100% of the subscribed and paid-up equity capital of the company.

5. COMPLETION OF SALE OF KAYGEE SHARES

5.1 The VENDORS agree to sell and transfer and LOPAREX agree to purchase and accept the transfer of the KAYGEE SHARES at a price of Rs.1183.704 per share aggregating to Rs.63,92,00,000 Rupees Sixty-Three Crores and Ninety-Two Lakhs only (The "Price")

6. NON-COMPETE

6.1. The VENDORS covenant with the Company and LOPAREX that any of the VENDORS (and the VENDORS shall ensure that any of their affiliates, shareholders, group companies, Family Members) shall not, for a period of 3 years from the date of this Agreement, either by themselves or through any person, directly or indirectly, in their own capacity or in the capacity of a partner, proprietor, director,

employee, contractor, trustee, shareholder, agent, advisor, representatives or other constituent, whether on their own or jointly with others, engage in a business similar to that of the Company or do any of the following acts:

a. induces, procure, or endeavour to induce or employ, any person who is an employee (including but not limited to, Manish Jain, Mahesh Divate and Ravindra Yawkar) of or any other service provider to the Company, to leave the employment of, or cease to provide service to, the Company;

b. approach, solicit or deal with, in competition with the Company, any person that at any time during the 12 months immediately preceding such date was a customer, client distributor, agent or supplier of the Company;

c) seek to interfere with the continuance of the supply of goods or services to the Company or terms of any supply; and

d) carry on, engage in or be concerned or interested in (whether as shareholder, lender, director, consultant, principal or as a partner, employee or agent of any person or otherwise), any business or activity which competes with the business and activities in which the Company is engaged. Except that the VENDORS can continue to carry on their existing business of contract toll manufacturing of release liner papers for the customer Mudrika Labels Put. Ltd., as well as manufacturing and marketing/ selling of label stocks (using internally manufactured release liners) as is currently carried out by them under the name and style of M/s Capri Coating Solutions, a partnership firm. VENDORS are in no means limited by this agreement from any external purchases of release liners. The Vendors through Capri Coating Solutions can also, subject to the prior approval of the Company, explore the new business opportunity of only contract toll manufacturing of release liner papers for new potential customers with whom the Company had no business dealings at any time during 12 months immediately preceding the date on which the VENDORS share the details of such new customers and business opportunity with the Company, provided that the VENDORS share the details of such new customers and new business opportunity with the Company.

Once the VENDORS share the details of such new business opportunity with the Company, the Company shall give their consent or dissent within a period of 3 working days. In case of dissent, the Company shall also inform the VENDORS the reason for such dissent. It is further agreed between the VENDORS and the Company that the Company shall act in good faith and shall not unreasonably withhold the consent for the new business opportunity being explored by the VENDORS.

However, the restrictions on being a shareholder/ director shall not apply in case of any investment by the VENDORS in shares of any listed company so long as their holding does not exceed 5% in each company.

6.2. Each of the restrictions as set out in Article 6.1 above is separate and distinct and is to be construed separately from other such restrictions. Each of the VENDORS acknowledge that they consider such restrictions to be reasonable both individually and in aggregate and that the duration, extent and application of each of such restrictions are no greater than is necessary for the protection of the goodwill and of the business of the Company and that the purchase of the KAYGEE SHARES by LOPAREX adequately compensates them for any restriction or restraint imposed as set out in this Agreement. However, if any such restriction shall be found to be void or unenforceable, but would be valid or enforceable if some part of it were deleted or the period or area of application reduced, the VENDORS agree that such restriction shall apply such modifications as may be necessary to make it valid.

6.3. Each of the VENDORS acknowledge that a breach by them of this Article 6 shall cause LOPAREX irreparable injury for which LOPAREX would have no adequate remedy at law and for which

damages would not constitute reasonable recompense and accordingly it shall be open to LOPAREX to apply for and obtain injunctory/declaratory relief against the VENDORS in breach or allegedly in breach and the VENDORS shall submit to orders and injunctions prayed and waive objections, if any, to such actions or proceedings or relief sought to the extent permitted by applicable Law."

8. A perusal of the above covenants clearly established the terms and conditions of the transactions and duties and rights of both the parties, without any specific consideration assigned to any of the covenant. It is clearly established that basically the transaction was entered into to buy the shares from assessee and other shareholders of KLIPL.

9. We have gone through the financials of the KLIPL for the year 2013-14 and 2014-15. The EPS was Rs 124.5/- and Rs 134.07/- respectively. It means purchase price of Rs1183.704/- is 8.82 times of the EPS. This ratio of 8.82 of EPS is not excessive or unreasonable assuming shares of KLIPL would have been listed although they are not. The overall transaction of this share sale looks to be fair and reasonable as evident from the order of the A.O. and the order of Ld. CIT(A).

10. Now we will analyse the nature of transaction to determine the character of receipts to be assessed. In this regard provisions of proviso to sec 28(va) is relevant which is reproduced herein below as under

“Any sum, whether received or receivable in cash or kind, on account of transfer of the rights to manufacture, produce or process any article or thing or right to carry on any business of profession, which is chargeable under the head capital gains” this proviso clearly spelled out an exception to the applicability of sub clause (a) of sec 28(va).

11. This is established position of law that any such receipt which deprived the transferor from undertaking any transaction in similar business or trade is capital receipt. Such right of assessee is duly covered as capital asset as defined in sec 2(14). On such type of receipt being asset first charge on assessee will be under the head capital gain only. If assessee is not offering such receipt under the head capital gains, then only it is chargeable to tax under sec 28(va). Chargeability of such type of receipt under sec 28(va) was introduced in statute with effect from assessment year 2003-04 with a proviso mentioned supra. Whereas such type of transactions categorically covered by the finance act 1997 i.e., with effect from A.Y 1998-99 through sec 55(2)(a).

12. From the transactions and covenants of agreement mentioned (supra), it clearly emanates that the business was being carried out by M/s KLIPL and assessee was simply a shareholder and not directly into the business so it can be affirmed that the transactions of assessee with LOPAREX BV was transfer of shares and not of business itself. In this regard we relied upon the decisions of following Hon’ble high court/apex court

- i) *CIT Vs New India Assurance Company Ltd 122 ITR 633 (Mum.)*
- ii) *CIT Vs F.X. Periera and Sons (Travancore) Pvt Ltd. 184 ITR 461 (Ker.)*
- iii) *CIT Vs West Coast Chemicals and Industries Ltd 46 ITR 135 (S.C)*
- IV) *CIT Vs Mugni Ram Bangur and Co 57 ITR 299 (S.C)*
- V) *West Coast Electric Supply Corporation Ltd Vs CIT 107 ITR 483 (Mad.)*
- vi) *Syndicate Bank Ltd Vs CIT 155 ITR 681 (Kar.)*
- vii) *Indian Bank Ltd Vs CIT 153 ITR 282 (Mad.)*
- viii) *ACIT vs. Savita N. Mandhana & Ors., ITA No. 3900/Mum/2010*
- ix) *Rohitasava Chand Vs. CIT 306 ITR 242 (Del.)*
- x) *CIT Vs. Saroj Kumar Poddar 279 ITR 573 (Cal.)*
- xi) *CIT Vs. Shiv Raj Gupta 372 ITR 337 (Del.)*

13. The jurisdictional ITAT in the case of similar facts, held in the case of *Hami Aspi Balsara Vs ACIT 126 ITD 100*, held as under

“Admittedly, in the share purchase agreement no consideration was assigned towards non-compete fees and the parties had entered into the share purchase agreement after mutually settling the price of shares. This clause clearly shows that in the purchase price of shares, consideration towards Restraint Clause was embedded. Admittedly, assessee on her own was not carrying on business and it was the company in which she was shareholder was carrying on the business,

... Thus, section 28(va) would be attracted where the assessee was carrying on business and not where assessee only had right to carry on business in the form of capital asset.”

14. In view of the above facts, pronouncement of Hon’ble High Court and jurisdictional ITAT, we are of the considered view that the assessee had rightly declared income under the head Capital gains. No portion of considerations can

be attributed for the purposes of sec 28(va) hence we set aside the finding of Ld. CIT(A)., attributing 5% of the consideration as income covered by sec 28(va).

15. In the result, appeal filed by the assessee is **allowed**.

ITA No. 1186/Mum/2020 (A.Y. 2016-17)

16. The facts and law applicable to this appeal are similar to **ITA No. 1185/Mum/2020 (A.Y. 2016-17) (Supra)**. As the grounds of appeal raised by assessee in this appeal are also similar to ITA No. 1185 mentioned (Supra.), hence our decision in this appeal also applicable *Mutatis Mutandis*. Hence grounds of appeal raised are **allowed**.

17. In the result, appeal filed by the assessee is **allowed**.

ITA No. 1187/Mum/2020 (A.Y. 2016-17)

18. The facts and law applicable to this appeal are similar to **ITA No. 1185/Mum/2020 (A.Y. 2016-17) (Supra)**. As the grounds of appeal raised by assessee in this appeal are also similar to ITA No. 1185 mentioned (Supra.), hence our decision in this appeal also applicable *Mutatis Mutandis*. Hence grounds of appeal raised are **allowed**.

19. In the result, appeal filed by the assessee is **allowed**.

ITA No. 1309/Mum/2020 (A.Y. 2016-17)

Grounds of Appeal Raised by Revenue

<i>Sl.No.</i>	<i>Grounds of Appeal</i>	<i>Tax effect (Amt in Rs.)</i>
1	"Whether on facts and circumstances of the case, and in law, the Ld CIT (A) erred in treating only 5% of the income earned on account of sale of shares of	3,65,52,895/-

	<i>M/s Kaygee Loparex India Ltd. on ad-hoc basis as non-compete fees despite specific clause in agreement for not carrying out any activities of specific business, supporting disallowance as non-compete fees?"</i>	
2	<i>"Whether on facts and circumstances of the case, and in law, the Ld CIT (A) erred in arbitrarily rejecting AO's working of non-compete fees, based on difference of value of shares, adopted under rule 11UA and sale value of shares, and arbitrarily estimated 5% of sale consideration of shares as non-compete fee?"</i>	<i>As above</i>
3	<i>"Whether on facts and circumstances of the case, and in law, the Ld CIT (A) erred in giving relief of disallowance of Short-Term Capital Loss of Rs.3,09,71,101/- u/s 94(7) of the Income Tax Act, 1961 without appreciating the provision of section 94(7) applied to the case?"</i>	<i>61,94,220/-</i>
	<i>TOTAL TAX EFFECT</i>	<i>4,27,47,115/-</i>

20. This is an appeal filed by revenue against the order of Ld. CIT(A). 53 (Mum.) against the appeal order in favour of assessee (Partly), i.e., M/s Kaygee Investments Pvt Ltd. Facts and figures involved are similar to what we discussed (Supra) in **ITA No. 1187/Mum/2020 (A.Y. 2016-17)**.

21. Ground No-1 and 2, issues raised in these two grounds are already been discussed, analysed and decided in favour of assessee (**ITA No. 1186/Mum/2020 (A.Y. 2016-17)**). Hence in the light of our decisions in assessee's appeal there is no need to further adjudicate these two grounds of appeal raised by revenue. In view of this, these two grounds became infructuous and accordingly dismissed.

22. During the AY under consideration assessee has claimed exempted income u/s 10(35) of the act on dividend income received on the units of Religare Invesco Contra Fund (Mutual fund) amounting to Rs 3,09,71,101/-. In addition to this assessee also claimed short term capital loss (STCL) of Rs 4,18.42,536/-. On the sale of abovementioned units of mutual Fund. To verify this transaction A.O. issued notice u/s 142(1), that the said transactions are not hit by the provisions of sec 94(7) of the act.

23. In order to understand the provisions of Sec. 94(7), the same is reproduced hereunder:

*“a). any person buys or acquires any securities or **unit** within a period of three months prior to the record date;*
b). such person sells or transfers-
i. such securities within a period of three months after such date; or
*ii. **such unit within a period of nine months after such date;***
*c) **the dividend or income on such securities or unit received or receivable by such person is exempt**, then, the loss, if any, arising to him on account of such purchase and sale of securities or **unit**, to the extent such loss does not exceed the amount of dividend or income received or receivable on such securities or **unit**, shall be ignored for the purposes of computing his income chargeable to tax.”* There are 3 essential conditions are laid down to apply the provisions of sec 94(7) of the act as under:

- A) units must be bought within a period of three months prior to the record date;
- B) units must be sold within a period of 9 months after such date
- C) dividend or income on such units received must be exempt.

If all the conditions mentioned (Supra) cumulatively fulfilled then only sec 94(7) will be attracted.

24. In the assessee’s case, units were purchased much before 3 months period prior to record date, hence condition prescribed in clause (a) of sec 94(7) is not

satisfied hence sec 94(7) can't be applied to the assessee's case. To substantiate our findings, we are relying on the following decisions of various High Courts and ITAT as under:

- "i). CIT Vs Shambu Mercantile Ltd. 325 ITR 535 (Del.)*
- ii). CIT Vs Kailash Chandra Dhanuka 252 CTR 109 (M.P)*
- iii). Vijaya Joshi Vs ACIT, ITA No. 979/Del./2013*
- iv). CIT Vs Walfort Shares and Stock Brokers Pvt Ltd 2019 CTR 409 (Bom.)*

Judgement of jurisdictional High Court in the case of CIT Vs Alka Bhosle 325 ITR 550 held as under:

"From 2004, the memoranda explaining, respectively, the finance bill 2001 and 2004, it is evident that the conditions prescribed in clauses (a), (b) and (c) of sub-section (7) are intended to be cumulative in nature. In the circumstances, the appeal by the revenue was lacking in merit and did not raise any substantial question of law. [Para 7]"

25. The A.O. has not brought any evidence on record about motive of the assessee in indulging the transaction to earn loss. It is also on record that the transactions entered into by the assessee is with the SEBI regulated mutual fund scheme of a very big and reputed asset management company. Even remotely it can't be assumed that the intentions of the assessee are to earn the loss with the gloves in hand with a reputed AMC.

26. In the result we are in agreement with a finding of Ld. CIT(A) and sustained the deletions made by him. Hence this ground of appeal filed by revenue is **dismissed**.

27. In the result appeal of the revenue is fully **dismissed**

ITA No. 1310/Mum/2020 (A.Y. 2016-17)

28. The facts and law applicable to this appeal are similar to **ITA No. 1310/Mum/2020 (A.Y. 2016-17) (Supra)**. As the grounds of appeal raised by revenue in this appeal are also similar to ITA No. 1309 mentioned (Supra.), hence our decision in this appeal also applicable *Mutatis Mutandis*. Hence grounds of appeal raised are **dismissed**.

29. In the result, appeal filed by the revenue is fully **dismissed**.

Order pronounced in the open court on 10th August, 2022

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक / Dated: 10/08/2022

SK, Sr.PS

Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई / DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

BY ORDER,

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(Dy. /Asstt. Registrar)
ITAT, Mumbai